UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

CADILLAC OF NAPERVILLE

and

Cases 13-CA-207245

AUTOMOBILE MECHANICS LOCAL 701,
INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS
AFL-CIO

RESPONDENT CADILLAC OF NAPERVILLE'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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Counsel for the Respondent respectfully submits the following brief to the Honorable Michael A. Rosas, Administrative Law Judge.

I. STATEMENT OF THE CASE

This proceeding was initiated by the filing of charges (13-CA-207245) against the Respondent Cadillac of Naperville (hereinafter "Employer or Respondent"). These charges were filed by the Automobile Mechanics Local Lodge 701, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter "Union). A Complaint issued by the Regional Director for Region 13 on December 22, 2017.[1] The complaint alleges, *inter alia,* that Respondent threatened employees, discharged one employee, unlawfully made policy changes and failed to adhere to the strike settlement agreement. A hearing on the allegations of the complaint was held in Chicago, Illinois, on March 20 and 21, 2018.

II. ISSUES

1. Whether Frank Laskaris violated Section 8(a)(1) of the Act through six different discussion/conversations in 2017.

2. Whether John Francek unlawfully threatened employees with layoff due to leafletting activity.

3. Whether John Bisbikis would have been fired in the absence of union activity.

4. Whether Respondent unlawfully promulgated a new attendance policy.

5. Whether Respondent disciplined employees for violating the new attendance policy.

6. Whether Respondent withdrew a free rubber gloves and bottled water policy.

7. Whether Respondent unlawfully assigned employees the job duty of hand washing cars.

[1] An amendment issued on February 27, 2018.

8. Whether Respondent revoked union access to its facility.

III. FACTS

A. Background

Respondent is an individually owned auto dealership in Naperville, IL owned and operated by Frank Laskaris. (Tr. 203-204)[2] Mr. Laskaris has owned this dealership continuously since 1996, when he acquired it. (Tr. 204) At the time of acquisition, Respondent's mechanics were represented by the union. Several years after Laskaris purchased the company, the dealership became a member of the Chicago area New Car Dealer Committee (herein "NCDC"), which is a multi-employer bargaining group that was established for the purpose of bargaining with the union. (Tr. 205)[3] The NCDC encompasses 129 dealers with approximately 1,949 employees. (Tr. 24)

The union and the NCDC had a collective bargaining agreement which expired by its terms on July 31, 2017. (Jt. 1) Unfortunately, negotiations for a successor to that agreement stalled and an economic strike commenced on August 1, 2017. (Tr. 24) The strike for most of the employers, including Respondent, lasted seven and one-half weeks. (Tr. 25) The strike had a "horrible" effect on Respondent's business, and an economic impact on all struck dealers that has effects to this day. (Tr. 215)

At the conclusion of the strike, the parties entered into a Strike Settlement Agreement. (Jt. 3) It is clear from the unrebutted testimony that management believed it had three days to effectuate getting the striking employees returned to work. (Jt. 3, Tr. 218-219, Tr. 283)[4] The

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[2] Pages of the transcript are designated herein by "Tr. __", the General Counsel's exhibits by "GC" and a number, Joint exhibits by "Jt" and a number and Respondent's exhibits by "R" and a number.

[3] The NCDC is actually a multi-employer bargaining group, not an entity designated for mere "convenience bargaining." (Tr. 67)

[4] Although the three days is not specifically written into the strike settlement agreement, it can be inferred from the layoff recall process in the parties' collective bargaining agreement. (Jt. 2, Article 3)

strike ended on a weekend in September 2018. (Tr. 30, Tr. 218) Discussions to bring back the striking employees at Respondent began on Monday morning, September 18. (Tr. 30, Tr. 219, Tr. 283)

B. **Events of September 18 and 19**

Most of the tendentious activity in this case occurred in a flurry of activity beginning on the morning of September 18, 2017. Surprisingly, much of the discussion is not in dispute, but generally the management witnesses gave more complete accounts of what transpired. Where there is an apparent or genuine dispute, those areas are identified in arguments pertaining to credibility, *infra*.

On the morning of September 18, the union gathered all of the striking employees and along with business representative Sam Cicinelli and Ken Thomas the business agent, amassed outside Respondent's dealership. (Tr. 168, 284) Around 7 a.m. on September 18, Cicinelli, Thomas and Bisbikis entered the dealership and went to the office of the owner, Laskaris, where he was meeting with Francek. (Tr. 38-9, 221, 284-85) Although the complete versions of the conversation vary, everyone agrees that Bisbikis was excluded from the initial conversation, while Laskaris attempted to negotiate an agreement to forestall some of the strikers from returning. (Tr. 41, 169, 221-2, 284-287)

Thereafter, Cicinelli, Thomas and Bisbikis returned to meet with Laskaris and Bisbikis. It was during this conference that Bisbikis was terminated. (Tr. 46, 130, 172, 232) Shortly after Bisbikis was terminated, there was a third discussion involving Laskaris and Cicinelli, regarding when the returning workers needed to have their tools available to report to work. (Tr. 238-239, 292)

The following day, when the technicians reported to work, they were sent home because they did not have their tools. (Tr. 51) Laskaris led all of the mechanics and Cicinelli into the

new car delivery area and while the group was being led back, Cicinelli engaged a customer by stating "these are your real mechanics, the guys in back are scabs." (Tr. 240-241, 295)[5] This discussion was basically an argument between the parties about the availability of technicians' tools. The union continually postured that the employees could not get their tools.[6] Ultimately, Laskaris allowed them to return with their tools after the shop closed that day and permitted them to return to work the following day. (Tr. 242-243)[7]

IV. ARGUMENT

The totality of this case is about strikes - the intense passion that is aroused in both management and striking employees. Speaking generally, managers do not like seeing vulnerability as revenues dry up, other aspects of the business are impacted, striking employees may be misbehaving on the picket line or in social (and even mainstream media) and customers are caught in the middle. Strikers do not enjoy the loss of wages and benefits, the uncertainty surrounding their employment, the threat of replacement and the emotion generated against those who replace them. It is a labor relations reality that strikes can permanently alter an organization, create divides that may never heal. And rarely is one side entirely in the right.

Every single aspect of this case was precipitated by the strike and its residual effects. This car dealership is not a corporate behemoth focused solely on numbers, it is a smaller, family

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[5] Cicinelli's testimony on this issue was yet another example of his selective memory and effort to present testimony only in a light favorable to himself. He did not provide any of this account on direct examination but grudgingly admitted addressing a customer on cross-examination. This use of prevarication throughout his testimony severely undercuts Cicinelli's credibility, discussed, *infra*.

[6] This begs the question, of course, why they did not secure their tools the previous day – or even that morning. Ultimately, the union's posturing is undercut by the immediate manner in which they were able to secure their tools and present them for work.

[7] The complaint allegation of September 19 appears to be "supported" by the testimony of Ron Gonzales, a journeyman technician. He alleges that during the meeting in the drive – Laskaris told the gathered employees that they would be written up because they were late and they did not have their tools. (Tr. 157) This statement is not corroborated by any other version of that day's events. Moreover, it does not really make logical sense. The employees were not yet reinstated, so write-ups for tardiness do not really make sense. Of course, the over-arching discussion was about the tools and the attendant gamesmanship, so it is likely that Gonzalez heard discussion regarding tools. However, Counsel for the General Counsel has failed to support the allegation that Laskaris threatened employees at this time.

owned business that management and employees alike considered "family" and "home" until the labor troubles. Then, the problems started.

The union HATED Laskaris and Cadillac of Naperville, because they had the temerity to hire replacement workers and continuing operating its business. Respondent became resentful of the strikers and the union because of their behavior during the strike, some of the behavior was lawful flexing of "economic weapons" and some of it was old fashioned picket line misconduct. Unfortunately, conflict, if not outright conflagration, was inevitable.

The story really begins the weekend the strike ended. The union had its choice of places to "plant the flag" after a very successful strike. They could have taken their victory lap at any of the 129 dealerships where they struck, but they chose Respondent. Their targeting of Respondent is no secret - they resented being replaced. This was one of only three dealerships that apparently hired replacements. This would be where they proved a point.

Notwithstanding the fact they had not reached an agreement with Respondent on how and when the strikers would return, they instructed **every single** striker to report on the morning of the 18th. Cicinelli testified he picked this dealership because he "anticipated" issues based upon the use of replacements. (Tr. 68) None of them came prepared to work and business agent Thomas even admitted "we knew there was going to be a problem." (Tr. 169) As described by Laskaris, the union came looking to "pick a fight." (Tr. 224) This was underscored by the fact that the union brought with them **pre-drafted** grievances without giving the talks any opportunity to be fruitful. Tensions which were already high probably became escalated when Laskaris turned Bisbikis away from the first discussion on Monday morning. In a meeting described as "confrontational" and "emotionally charged," the union in an aggressive tone and

manor demanded that Laskaris get the "scabs" out.[8] (Tr. 221, 225, 285-287) During this first meeting, Laskaris implored the union to investigate whether people would be willing to take a buyout and go work elsewhere. (Tr. 40-41, 168, 220-223, 286-287)

When the union representatives returned with Bisbikis, the fuse had been lit. The account of the termination discussion varies tremendously between Counsel for the General Counsel's witnesses and Respondent's witnesses. Cicinelli, Bisbikis and Thomas offered scant details, inconsistent themes and statements and generally obtuse and obscure versions of the account. Conversely, Laskaris and Francek offered virtually identical versions of the conversation and recalled the incident in clear detail. They were both calm and offered fully corroborating versions of the same event. It is **critical** to note that neither had any previous sworn statements to memorize for providing testimony and that Francek testified **immediately** upon the conclusion of Laskaris, so it would have been impossible for them to "compare notes" or crib each other's testimony. Francek was sequestered during Laskaris' testimony, so it is literally impossible for him to have altered his recollection based upon hearing courtroom testimony. The reason their testimony tracked is simple: it was truthful. Both men testified to the events in an unashamed manner and did not omit details that may not have put them in an improved light. Conversely, Counsel for the General Counsel's witnesses gave heavily redacted versions of the conversation. Where they could provide fill with self-serving detail, they did.[9] Moreover, omissions cannot be explained away by lawyering - Counsel for the General Counsel presented a very professional, thorough and detailed case. Thus, where the witnesses omitted details, a fact-finder can only conclude that they did so intentionally, not due to a lack of preparation or recall.

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[8] Meaningfully, Cicinelli omitted his use of the term "scab" during his direct examination. He grudgingly admitted its usage on cross-examination. (Tr. 70) Cicinelli's recalcitrance as a witness (along with all of Counsel for the General Counsel's witnesses) is fully discussed, *infra.*

[9] For instance, Cicinelli called the first meeting a "calm" conversation that never got heated, in opposition to every other person who witnessed the conversation. (Tr. 70)

The meeting with Bisbikis began with Laskaris continuing his efforts at persuading the union to take the strikers to other shops. First blood was drawn when Bisbikis admits to calling Laskaris a "liar." (Tr. 129)[10] Accordingly to Bisbikis, immediately thereafter Francek left to get some documents the union requested, but inexplicably, Bisbikis rose to leave without waiting for Francek to return with the documents. (Tr.132)

Laskaris, Francek and Bisbikis acknowledge that there was discussion, from Respondent, regarding strike line misconduct. (Tr. 229-230, 289) Undoubtedly, this was what triggered Bisbikis. Moreover, all three acknowledge that Francek stepped out of the meeting to retrieve copies of the replacement letters. (Tr. 230-231, 290-291) While Bisbikis denies swearing at Laskaris, he concedes calling him a liar. A far more significant likelihood, is that where Bisbikis claims to have called Laskaris a liar, this was the juncture where he expressed that Laskaris was a "stupid jack-off" in Greek. (Tr. 232) Unsurprisingly, this threw Laskaris into a rage. And he does not deny this. In response to Bisbikis moving around the desk and coming to invade Laskaris's space, Laskaris stood and stepped toward Bisbikis and told him you are not going to come into this office and swear at me. You are done. (Tr. 232)[11] Apparently having fulfilled his quest to make Laskaris angry, Bisbikis asked Cicinelli if he should go, in a snarky manner. (Tr. 233) Every single witness confirms this piece of the story. Cicinelli, laughing, told Bisbikis he could go. (Tr. 233) The union came to Respondent to cause trouble and they succeeded in causing conflict.

[10] The admission about calling Laskaris a liar is not in either Cicinelli nor Thomas's testimony.
[11] This was followed with a written termination. (Jt. 6)

A. **John Bisbikis**

1. **June 29 Allegation.**

The complaint alleges that on June 29, Laskaris threatened employees with reprisal if they went on strike. This emanates from an alleged conversation testified to by Bisbikis. Bisbikis alleges at a time when nobody contemplated or prepared for strike activity, that Laskaris blurted out, "if [the employees] go on strike, things would not be the same." (Tr. 117) This was supposedly said without context and without follow up comment. Laskaris testified that in that time period, they discussed t-shirts and employees having to pay for them. (Tr. 206) It is highly unlikely this comment was made, but even if it were, it is not only a truthful opinion, it proved rather prophetic.

Bisbikis should not be credited. He attempted to corroborate himself by referencing this conversation during the September 18 termination conversation. (Tr. 129) However, neither Cicinelli nor Thomas corroborate this is any manner. Moreover, the union tried to buttress this statement on questioning by Mr. Anderson to Bisbikis, stating that Cicinelli was referencing the June 29 meeting in Laskaris's office. (Tr. 140) This desperate attempt at self-corroboration fails miserable, because of course, Cicinelli was not at the June 29 meeting. The failure of Cicinelli and Thomas to corroborate this statement in any way is fatal. If the statement was not made, it could not be unlawful.

Nevertheless, nothing in the statement that pointing out things are not the same after a strike implies reprisal. Thus, even if Bisbikis were credited, he has failed to allege a statement that objectively rises to the level of threat. Laskaris merely proffered an opinion that after a strike things would not be the same. He was not showing photos of out of work strikers, he was not handing out articles about businesses closing or strikers having homes foreclosed. Absolutely nothing in the naked statement could be seen as inferring reprisal. There is no allegation that he

was asked to repeat it, or that it was offered as a warning. Thus, even if credited, the statement does not violate Section 8(a)(1).

2. **Bisbikis Discharge**

As alleged in the complaint, John Bisbikis was discharged on September 18, 2017. Bisbikis was in a meeting in Laskaris's office which turned heated and Bisbikis took it upon himself to swear and physically menace Laskaris, which resulted is his summary termination. Bisbikis through his actions, lost protection of the Act.

The legal paradigm for proving this allegation is straightforward. Section 8(a)(3) of the Act provides, in relevant part that it is an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. 29 U.S.C. Section 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally, encouraging or discouraging participation in concerted or union activities. *Radio Officers Union v. NLRB*, 347 U.S. 17, 39-40 (1954); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 right, any violation of Section 8(a)(3) derivatively violates Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

The Board's Supreme Court approved standard for cases turning on motivation is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 899), cert. denied, 455 U.S. 989 (1982). See *Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries its burden by persuading by a preponderance of evidence that employee protected conduct was a substantial or motivating factor (in whole or in part) for the employer's adverse employment

action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record in its entirety.

Under *Wright Line*, Counsel for the General Counsel must first demonstrate, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor in the adverse action. This burden is satisfied by showing protected activity, employer knowledge of such activity and animus.

If this burden is satisfied, the burden shifts to the employer to prove that it would have taken the same adverse action, even absent the protected activity. *Mesker Door*, 357 NLRB No. 59, slip op. at 2 (2011). The employer does not meet its burden merely showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3-4 (2011). If the employer's preferred reasons are pretextual (i.e. either false or not actually relied upon), the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 213, 223 (D.C. Cir. 2005).

It would be absurd to argue that Counsel for the General Counsel does not easily satisfy the first two prongs of her burden. Bisbikis was a union steward and on the union's negotiating committee. He was present at the Respondent's facility on the fateful day in his capacity as union representative. However, after this, the 8(a)(3) allegation regarding Bisbikis is much more

tenuous. Contrary to the histrionics in the allegations, there was no animus directed at Bisbikis. Certainly there is no animus *prior* to his discharge. As discussed, *supra*, the June 29 allegation does not merit a finding. All of the remaining allegations occur after the discharge of Bisbikis.

The elements of proof become murky thereafter. As argued vehemently throughout this brief, Respondent denies that it has violated the Act in any manner. Moreover, the Respondent denies displaying any animus toward the union. Nevertheless, recognizing that the discharge of a union steward, standing alone, may be seen as having an effect of discouraging union membership, this argument focuses on the overwhelmingly established evidence that Respondent has come forward with evidence of a legitimate and substantial business justification.

None of the ordinary circumstantial measures usually relied upon by the Board buttresses Counsel for the General Counsel's case. There was no delay in effectuating the discharge.[12] There was no departure from Respondent's normally established procedures for disciplining employees.[13] It cannot be argued that the union or Bisbikis was unaware of the reasons for his discharge contemporaneous with his discharge.[14] There were no shifting reasons preferred for Bisbikis's discharge, nor is the timing questionable nor suspicious. Finally, there is no indication that the Respondent ever allowed any other employee to swear at, menace and intimidate the President in his own office. Therefore, none of the ordinary indicia of pretext relating to Respondent's discharge of Bisbikis are present.

Counsel for the General Counsel is likely to argue that this case is simply one of opprobrious conduct and it is not egregious enough to lose the Act's protection. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) However, even if this case fell under *Atlantic Steel,* Bisbikis's actions fall outside of its protections. While discussing a return to work for fellow strikers,

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[12] *National Grange Mutual Insurance Co.*, 207 NLRB 431 (1973)
[13] See, *Wells Blue Bunny*, 287 NLRB 827 (1987), enfd. 865 F.2d 175 (8th Cir. 1989)
[14] *Forest Park Ambulance Service*, 206 NLRB 550 (1973)

Bisbikis and Cicinelli made every effort to create confrontation. Without any provocation whatsoever, Bisbikis took it upon himself to cleverly swear at Laskaris in Greek, walk around the desk and violate Laskaris's personal space and yell. Nobody should have to tolerate that level of disrespect, particularly the President of the company. Bisbikis came with the goal of stirring up trouble and he created more than he bargained for.

B. **8(a)(1) Allegations**

1. **September 20 and 29 Allegations**

The complaint alleges that employees were threatened with discharge for participating in a strike on September 20 and 29. The first incident stems from a conversation between Frank Laskaris and an apprentice, Patrick Towe. Laskaris summoned Towe to his office to discuss Towe's picket line misconduct. Specifically, Laskaris showed Towe a videotape that he had been sent which showed Towe intentionally blocking a woman from leaving the dealership. (Tr. 82-83) The conversation was exclusively about Towe's picket line misconduct, not about any other aspect of the strike at all. Laskaris pressed why Towe would want to return after engaging in that type of behavior. Towe said that it was his home and Laskaris countered if it was his "home" he would not behave like that. (Tr. 83) According to Towe, Laskaris went on to say that Towe would not be there very long. (Tr. 84) This is not a threat of discharge for engaging in a strike, but is more akin to a disciplinary meeting. Towe was being upbraided for strike misconduct. The only reasonable interpretation of this meeting is that Towe was being warned that further unlawful acts would be met with discharge.

The other allegation alleges conduct on September 29, but there is no specific testimony regarding this date. Rather, this allegation appears to stem from a discussion between Laskaris and technicians. There was only testimony from Ron Gonzalez, otherwise this testimony went un-corroborated. Specifically, Gonzalez says that Laskaris informed the employees, "if we run

out of work, I will lay every one of you off." (Tr. 158) While this did occur in the context of a discussion regarding continued leafletting, it specifically addressed only employee workload. It is not an unfair labor practice to inform employees they will be laid off for a lack of work.

2. **October 6, 2017 Meeting**[15]

Many of the allegations pertaining to animus are alleged around the October 6, 2017 meeting that Laskaris held with employees. While evidence presented on these allegations was obtained illegally (discussed *infra),* the evidence demonstrates that Laskaris did not violate the Act. Although Respondent argues that this recording should be excluded, the tape itself does highlight a number of important points. Since testimony would have been taken on these allegations and undoubtedly been imprecise, the recording is somewhat useful. It indicates the passion on both sides in the aftermath of the strike. He discusses specific examples of union misconduct on the picket line, including the blocking of ingress/egress. Laskaris expresses his frustration at the state of the shop following the strike frequently utilizing profanity. But none of the profane language alters the discussion and it is not illegal to communicate using swear words.

Laskaris repeatedly stated throughout the meeting that he wanted to express his opinion on where things stood. If there was a theme for this meeting it could have been, I think you need to stand up and speak for yourselves.

The first allegation is that Laskaris conveyed the message that it would be futile to bring complaints to the union. Laskaris repeatedly states that employees should grieve whatever they want. He repeatedly states his belief that the grievances being filed are trivial, and continuously holds out the water and gloves of an example of trivial grievances. He invites them to file grievances that are meaningful under the contract, citing "hours and pay" as "real" grievances.

[15] Evidence of this meeting was presented in the form of an audio recording. Curiously, the court reporter did not transcribe the recording for the official record. Every effort is made herein to quote the recording literally, and where appropriate, a time designation is indicated.

But while stating that "they aren't going to tell me what to do" he repeatedly emphasizes that he will follow and abide the collective bargaining agreement. Taking the meeting in context, the only take-away is that management believes that the employees are being manipulated and forcing grievances that do not further the relationship. Futility is not inferred or stated.

The next allegation is that employees are solicited to resign their membership in the union. At the 14:40 mark on the tape, Laskaris states that every member has an option to become a financial core member. He correctly informs them that would result in them losing their right to vote on contract matters. He tells them that they could not be required to go on strike. And he ends the soliloquy stating, "it doesn't matter to me what you choose." It is not unlawful for an employer to inform employees of their *Beck* rights.[16] Laskaris merely shares information and his personal opinion, but plainly states that he does not care what they choose. This is neither encouragement nor solicitation.

The next allegation is that employees were coerced by being told that other employees lost their jobs due to the strike. This was quite simply the conveyance of factual information. At 12:40, Laskaris gave the specific example of the parts employee who was laid off due to lack of work caused by the strike. This is the difficult reality of the consequences of a strike. A strike does not only have impacts on the employees and the management whom they target. There are ripple effects from a strike, co-workers, customers, other businesses. Laskaris cites many of these, discussing how vendors were impacted, people who manufacture the parts used in the business were impacted and how their co-workers were impacted. Admittedly, this is a difficult message. It is real. It is powerful. And, it may be unpleasant. But the factual expression that an employee was laid off in direct consequence of a strike is not unlawful.

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[16] *Communication Workers of America v. Beck*, 487 U.S. 735 (1988)

The following allegation was that the rules would be more strictly enforced if they continued to file grievances. Once again, the gravamen of this allegations derives from one of Laskaris's opinions. Specifically, around the ten minute mark of the tape, Laskaris states that if he were to follow the book precisely, it could make their lives harder. He did not provide any specific examples where work rules could be more onerous on the employees, but did imply that they exist. He did not, however, say anything about more strict rule enforcement if the grievances did continue. He did express exasperation with the volume of grievances and their nature. But he did not relate the grievances in any manner to his opinion that strict application of the collective bargaining agreement would result in more strict rule enforcement.

The final allegation relating to the October 6 meeting alleges the unspecified reprisal that would come because he would "eat their faces." Plainly, having one's face eaten would be an unpleasant experience. Nonetheless, there was nothing in this statement that could be construed as a threat relating to union activities. It arose in the context of Laskaris attempting to self-describe his view of his own personality. During the 40:05 minute of the tape he said, "I'm the nicest guy in the world, but if you put me in a corner, I will eat your face." He continued on to state that nothing "could stop me from being a prick." His point is that a collective bargaining relationship cannot force a person to be nice, or change their inner being. The collective bargaining relationship unfortunately does not - and cannot - guarantee us a workplace filled with people we love and adore. So, although his metaphor is odd, it does not rise to the level of a reprisal for engaging in protected activity. Surely, nobody in the room cowered in fear that their faces would be eaten. It was simply a silly statement made to emphasize a greater point, if you are nice to me, then I am nice to you.

3. Francek Threat Allegation

Counsel for the General Counsel alleges that Vice President Francek threatened employees with layoff because the Union engaged in leafletting outside Respondent's facility. This allegation is without merit. Even after all of the technicians returned to work with their toolboxes, union leafleting continued outside Respondent's facility. (Tr. 297) Francek credibly testified that when he was asked about potential layoffs, he responded "if work does not pick up, it is going to be disastrous, we are going to have to lay more people off." (Tr. 300) This re-emphasized a sentiment echoed earlier by the service director, that if work did not pick up they would have to lay more people off. (Tr. 298)

The context of these statements is vital. Any conversations relating to leafletting and layoffs was initiated by technicians, who wanted to know if they could address the people conducting the leafletting. (Tr. 298) A specific response that if work does not pick up there will be layoffs is not threatening in any manner. Francek did not seek to initiate these discussions, nor did he castigate the leafletting itself. Rather, he candidly pointed out the economic reality of the current workload. It should come as no surprise that if there is insufficient work to perform, then layoffs will follow. Francek's statement is not a threat, but more significantly, the mention of layoffs is not tied to leafletting activities, not even tangentially.

4. October 27 Allegation

Paragraph V(x) alleges that employees were threatened with discharge for participating in the strike. Specifically, this appears to derive from a phone call between Laskaris and technician Brian Higgins. (Tr. 150) Specifically, Higgins testified that Laskaris told him he did not want him there and that the strike had cause difficulties which required layoffs. While discussing the economic conditions, Higgins was informed that Laskaris could not personally guarantee that he would be there long.

Assuming that this conversation took place precisely as alleged, it does not arise to the level of a threat. Laskaris was discussing the current economic circumstances of the shop and pointed out that the strike had cause layoffs. Laskaris informed Higgins there is no guarantee that he would be there long. At best, this is an ambiguous statement. It arises in the context of a job offer, not a layoff or discharge. Higgins knew at this point that he was returning to work. Sharing with him that the workload may not guarantee he will be employed forever may be a case of too much information, but is not a threat of discharge for participating in a strike. The fact is, Laskaris would not have returned Higgins at all, which would have obviated the need for this call altogether. In the context, this is simply a strong communication of the current economic climate in the shop.

C. **8(a)(3) Allegations**

1. **Attendance Policy**[17]

There are three allegations in the complaint regarding the attendance policy: it is alleged as both an 8(a)(3) and (5) and there are six allegations that employees were disciplined for violating the alleged policy. Addressing the simplest allegation first - there is simply no evidence documentary or testimonial, that any employee was actually disciplined for violating the attendance policy. Counsel for the General Counsel adduced zero documents reflecting a disciplinary warning for violation of the attendance policy. There were none produced from employees who ostensibly would have had copies and there were no in response to documents requested from Respondent by subpoena. Only two of the individuals listed in the Complain testified - Towe and Gonzalez. Gonzalez specifically testified that he was not written up as a result of the policy, nor were any of his co-workers. (Tr. 161) Towe did not testify to being

[17] This allegation is also alleged under 8(a)(5). Both theories are addressed in this section.

written up. Accordingly, the allegations regarding specific employee disciplinary actions must be dismissed.

2. **Gloves and Water**

The allegations relating to the removal of bottled water seem to be more about misunderstanding and poor communication, rather than retaliation and refusal to bargain. First of all, the evidence fails to establish that bottled water was simply ever a benefit. Sometimes, water was provided on hot days. (Tr. 150) In fact, the ONLY corroboration regarding water was that it may have been provided when it was really hot. (Tr. 121)

In fact, employees always had to "pay" for the water, they were simply on the honor system. (Tr. 249-251) The water was provided with an honor box and employees were given the option of donating. (Tr. 250) The money that was collected in the honor box was then matched by an employer contribution with all of the funds being donated to a local food shelter. The fact that employees did not voluntarily donate does not change the essence of the benefit. In addition, once the water fountain had been repaired and reinstalled, there was no necessity to provide water. Accordingly, the water could not have been removed in retaliation for union activity and there was simply no requirement to meet with the union to install a water fountain.[18]

3. **Hand Washing Cars**

The complaint alleges that six employees were assigned to the less desirable job of washing cars. Again, only two of the six employees testified regarding this issue. Towe alleges that he was assigned to the task of hand washing cars as did Gonzalez. The entirety of the record is replete with testimony that work was slower in the aftermath of the strike. Towe grudgingly admitted as much on cross-examination. (Tr. 112) Gonzalez testified that employees were still paid at the proper rate when performing the task of washing cars. (Tr. 163)

[18] The provision of gloves is *de minimus*.

The most significant testimony regarding this issue came from union representative Cicinelli. He admitted that the collective bargaining agreement specifically addresses this situation in an article governing temporary work. (Tr. 72, Jt. 2 "Temporary Work.") In light of the fact that it is uncontested that work was slow after the strike and given that the collective bargaining agreement specifically permits an employer to assign other job duties when work is slack, this allegation must be dismissed.

D. **8(a)(5) Theories**

The only unaddressed 8(a)(5) theory relates to the complaint allegation that Union access to its facility had been revoked. This allegation is unsubstantiated.

The basis of the theory stems from a notice, sent from Laskaris to Cicinelli, informing them that in the future, notice would have to be given before arriving at the facility. (Jt. 8) The collective bargaining agreement simply permits the union access to the facility. (Jt. 2, "Union Access") There is no evidence than any representative was actually denied access to the facility. While the evidence does show that Cicinelli will be barred, there is nothing in the collective bargaining agreement restricting Respondent from banning a particular individual. The record reflects that Cicinelli had abused his access privileges, even taunting a customer. Absent evidence that the union was actually denied access to the facility, not merely altered to the manner in which they could gain access, this allegation must be dismissed.

V. PROCEDURAL ERRORS

There were two procedural errors during the hearing. The ALJ permitted an unlawfully obtained piece of evidence to be played during Counsel for the General Counsel's case in chief. In addition, the ALJ did not permit Respondent's counsel a proper amount of time to review witness affidavits in preparation for cross-examination, which is required by Board law.

During the examination of Patrick Towe, Counsel for the General Counsel produced a secret recording that Mr. Towe procured. (Tr. 90) The Illinois statute prohibits a party from utilizing an eavesdropping device in a surreptitious manner to record a private conversation. (720 ILCS 5/14-2(a)) Towe's authentication of the tape vividly establishes each and every element of this violation - a brand new, personal recorder which he kept hidden in his pocket for the duration of the meeting. (Tr. 89-91) At no time during the meeting was any party invited to tape record the meeting, but rather was invited to take notes. The fruits of this ill-gotten evidence should be excluded.[19]

ALJ Rosas also "exercised discretion" where none is available. Respondent's counsel properly utilized *Jencks*, 18 U.S.C. 3500 (1957) for legitimate cross-examination purposes. The NLRB Rules and Regulations specifically permit release of witness statements for the purpose of cross-examination. NLRB Rules and Regulations 102.118(b)(1) The generally accepted practice is to permit counsel to review the statement **for the duration of the hearing**. In *Wal-Mart Stores, Inc.*, 339 NLRB 64 (2003), the Board stated that an ALJ does not have discretion to allow retention of statements *after the close of the hearing*. *Wal-Mart* explicitly recognized that as an "operating procedure" counsel may retain the copy throughout the hearing to use for any legitimate trial purpose, but on the close of the hearing he will be expected to return the copy provided. *Id.* at 65, fn.3, *1970 Committee Reports*, Sec. of Labor Relations Law, American Bar Association, Vol. II, p. 12. Equally important, the word "discretion" **does not appear** in Section 102.118(b)(1). Respondent's counsel should have been afforded the opportunity to review the affidavits, some of which had been in the General's Counsel's possession for a lengthy period of

[19] To the extent cases such as *Times Herald Record*, 334 NLRB 350 (2001), enfd 27 Fed. Appx 64 (2d Cir. 2001) hold to the contrary, they should be overruled.

time, for the duration of the hearing. This is appropriate to ensure that cross-examination is thorough and balanced.

VI. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Complaint be dismissed in its entirety.

Respectfully submitted,

FREEBORN & PETERS LLP

By:/s/ Michael P. MacHarg

Dated: May 25, 2018

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

CADILLAC OF NAPERVILLE, INC.

and **Case 13-CA-207245**

AUTOMOBILE MECHANICS LOCAL 701, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that before 5:00 p.m. on May 25, 2018, I served a portable document format (pdf) copy of Respondent's Post-Hearing Brief to the Administrative Law Judge upon Christina Hill, Attorney, National Labor Relations Board Region 13, through the NLRB's electronic filing system.

On this same date, I certify that I served a copy of Respondent's Post-Hearing Brief to the Administrative Law Judge upon the following by email and/or regular mail:

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